No. 75-1501

In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD WELDON IVEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that evidence derived from a court-authorized wire interception should have been suppressed because three of them were not named in the intercept application and order.

After a non-jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conspiracy to operate and operation of an illegal gambling business, in violation of 18 U.S.C. 371 and 1955. Petitioners Ivey, Pirkle and Pyron received consecutive sentences of two years' imprisonment on each count; the sentences on the second count were suspended in favor of two years'

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probation. Petitioner Anderson received consecutive sentences of three years' imprisonment on each count; the sentence on the second count was suspended in favor of three years' probation. The court of appeals affirmed on March 16, 1976 (Pet. App. A). The petition for a writ of certiorari was not filed until April 16, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. There is in any event no reason to grant the writ.

The evidence established that petitioners operated a large numbers lottery keyed to the dollar volumes of stocks and bonds traded on the New York Stock Exchange (C.A. App. 147–160, 233–234, 321). Some of the evidence in the case was derived from a wire interception of a telephone used by petitioner Pirkle in conducting the illegal numbers business; monitoring of this telephone was authorized under a court order issued by Chief Judge Newell Edenfield, of the United States District Court for the Northern District of Georgia (C.A. App. 125A).

Petitioners contend that the evidence derived from the interception should have been suppressed since Ivey, Pyron and Anderson were not named in the intercept order and application, although, they claim, the government had probable cause to believe that their conversations about the gambling enterprise would be overheard. They rely upon 18 U.S.C. 2518 (1)(b)(iv), which provides that the application should include "the identity of the person, if known,

committing the offense and whose communications are to be intercepted."[1]

1. Only Ivey and Pyron have standing to seek suppression on this basis. Pirkle was named in both the application and order, and Anderson was not in fact overheard during the intercept. Pirkle and Anderson thus claim only that they are entitled to suppression because of an alleged defect in the application and order relating solely to two other persons. They are attempting to assert the rights of others as a basis for suppression of evidence obtained without violation of their own rights. But "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348; see *Brown* v. *United States*, 411 U.S. 223, 229–230. The traditional standing rules were incorporated into the suppression sections of the wire interception statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 91, 106 (1968); *Alderman* v. *United States*, 394 U.S. 165, 171–172, 175, n. 9; *United States* v. *Scasino*, 513 F. 2d 47 (C.A. 5); *United States* v. *Gibson*, 500 F. 2d 854 (C.A. 4), certiorari denied, 419 U.S. 1106. Accordingly, since petitioners Pirkle and Anderson cannot

[1] Similarly, 18 U.S.C. 2518(4)(a) requires the order to specify "the identity of the person, if known, whose communications are to be intercepted." This language imposes no broader requirement than the identification provisions of 18 U.S.C. 2518(1)(b)(iv). *United States* v. *Kahn*, 415 U.S. 143, 152.

claim that the omission of an identification of Ivey and Pyron violated any rights of theirs, they have no standing to complain of the failure to identify. *United States* v. *Scully, et al.*, C.A. 9, Nos. 74–2479, 74–2295, 74–1891, 74–1887, decided May 24, 1976.[2]

2. In any event, both courts below rejected the premise of petitioners' claim that Ivey, Pyron and Anderson should have been named in the application and order; the courts concluded that there was no probable cause to believe that their incriminating con-

[2] The decision in *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.), is not inconsistent with this conclusion. There, the court found that the failure to inform the authorizing judge that the conversations of one of the targets of the proposed interception had previously been intercepted rendered the entire subsequent interception illegal, since that information might have led to the denial of the authorization for the subsequent interception (*id.* at 838–839). Accordingly, the court concluded that the subsequent communications were "unlawfully intercepted" and subject to suppression on the motion of any "aggrieved person" under 18 U.S.C. 2518(10)(a), including any persons who were parties to the improperly intercepted conversations or against whom the interception was directed, 18 U.S.C. 2510(11). But see *United States* v. *Kilgore*, 524 F. 2d 957, 958, n. 1 (C.A. 5), petition for a writ of certiorari pending, No. 75–963. In contrast, here any failure to identify others in the application who might be overheard, when the main target was named, could scarcely have led to the denial of the intercept order and thus did not constitute a significant violation of any mandatory requirement of the Act of the kind involved in *Bellosi*. See the brief for the United States in *United States* v. *Donovan*, No. 75–212, pp. 34–36, a copy of which we are sending petitioners. But see *United States* v. *Picone*, 408 F. Supp. 255, 262 (D. Kan.), appeal pending, C.A. 10, No. 76–1027. Cf. *United States* v. *Chiarizio*, 525 F. 2d 289 (C.A. 2), in which the court assumed without deciding that a named conspirator had standing to object to the failure to name a co-conspirator, but then concluded the objection was without merit.

versations would be overheard on the intercepted phone (C.A. App. 132; Pet. App. 1a).[3] There is no need for this Court to review this essentially factual determination. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[4]

Although petitioners correctly point out (Pet. 9) that there is a conflict in the circuits on the scope of the naming requirement in wire intercept applications and orders because of different interpretations of 18 U.S.C. 2518(1)(b)(iv) and (4)(a), that conflict is not relevant to this case; no court has implied that persons must be identified in the absence of probable cause to anticipate that they will be overheard en-

[3] As petitioners note (Pet. 5), the affidavit showed that there was probable cause to believe that these three petitioners were involved in the gambling activity (C.A. App. 76–91). But it is clear that the only possibly relevant inquiry is whether there was probable cause to believe they were using the monitored telephone in these activities. See, *e.g.*, *United States* v. *Russo*, 527 F. 2d 1051, 1056 (C.A. 10), certiorari denied, No. 75–1218, June 1, 1976; *United States* v. *Martinez*, 498 F. 2d 464, 468 (C.A. 6), certiorari denied, 419 U.S. 1056.

[4] This conclusion was clearly correct. The only evidence suggesting that any of the petitioners other than Pirkle would be parties to monitored conversations was derived from the previous use of a pen register which indicated that Pirkle had used the target telephone on several occasions to call a telephone number frequently used by petitioner Pyron (Pet. 6). However, a pen register does not reveal the contents of any conversation or the actual parties to the call; it only establishes that a particular call was placed from one telephone to another. *United States* v. *Giordano*, 416 U.S. 505, 549, n. 1 (dissent). The informant cited by petitioners did not mention any use of the target, or any other, telephone (Pet. 6).

gaging in conversations about criminal activities. There is, accordingly, no need to hold this case pending disposition of *United States* v. *Donovan,* No. 75–212, *supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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